# No. 11,964

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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FRANK L. CHRISTENSEN,

*Appellant,*

vs.

CHARLES LEE TROTTER and JOHN S. RAYBURN,

*Appellees.*

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## BRIEF FOR APPELLEES.

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## Subject Index

## Table of Authorities Cited

### Cases



### Statutes



### Texts

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### STATEMENT OF THE CASE.

These two actions were instituted by the appellees, hereinafter called plaintiffs, to recover damages for personal injuries which they sustained when the train on which they were working came into collision with a truck owned by the defendant. The plaintiffs were Fireman and Engineer, respectively, on the second engine of the train when it collided with the truck of the defendant. Verdicts were returned by the jury in favor of the appellees, and judgment was entered in accordance with the verdicts. Thereafter the appellant filed a motion for a new trial which was heard and denied by the trial court.

The appellant has made three specifications of error: (1) That the trial court erroneously excluded from evidence complaints filed by the plaintiffs against The Atchison, Topeka and Santa Fe Railway Company for the same injuries that the present actions involved; (2) That the trial court was in error in instructing the jury upon the doctrine of *res ipsa loquitur;* (3) That the trial court gave an erroneous instruction based upon the statutes of Arizona relating to parking of motor vehicles on the highway. These points will be taken up in the above order.

The appellant has not made a detailed statement of the facts surrounding the happening of the accident in question. We feel that the court will have a better understanding of the situation if the facts are set forth together with all reasonable inferences to be drawn therefrom in disregard of any adverse showing made by the appellant. This is in accordance with established law.

> "If, disregarding all adverse evidence and giving credit to all evidence favorable to him and indulging in every legitimate conclusion favorable to him which may be drawn from the facts proved, it supports the verdict, the verdict must be sustained."
>
> *Henwood v. Neal,* 198 S.W. (2d) 125.

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**FACTS.**

The plaintiff Charles Lee Trotter was the fireman, and the plaintiff John S. Rayburn was the engineer on the second engine of the second section of number

three train that was proceeding into Kingman, Arizona, at about 1:20 A.M. on March 24, 1944, traveling in a westerly direction. (T.R. p. 84.) The engineer in the first or lead engine had control of the two engines. (T.R. p. 104.) About a mile east of the Kingman station with the train traveling at a speed of about 30 miles an hour (T.R. p. 94), the plaintiff Trotter saw a truck on the tracks (T.R. p. 84) which was directly across the rails and was headed in a southerly direction. (T.R. p. 90.) No road crossed the tracks at that point. (T.R. p. 92.) Trotter hollered to the engineer, the plaintiff Rayburn, that there was a truck on the tracks (T.R. p. 84), and Rayburn looked out and saw the truck and reached for the emergency brake, but by that time the engineer in the lead engine had already applied the air. (T.R. p. 105.) The lead engine struck the truck, and the second engine occupied by the plaintiff was derailed, and the lurching of the engine after derailment caused Rayburn to be thrown out the cab window (T.R. pp. 105, 106), and Trotter to be pinned between the cab and tank of the second engine. (T.R. pp. 84, 85.)

The truck and trailer that caused the accident was owned by the appellant, Frank L. Christensen, hereinafter called defendant. The truck was in the control of and was operated by Conda Wilson, an employee of the defendant. He was acting in the regular course and scope of his employment at all times. (T.R. p. 53.)

Conda Wilson had delivered a load of sheep in the neighborhood of Kingman and had driven back into

Kingman and stopped to get a cup of coffee at a little restaurant called Peggy's Cafe. (T.R. pp. 142, 143.) From this cafe to the point where the truck and trailer were across the railroad tracks was a distance of 395 feet (T.R. p. 130) and the Cafe was 13 feet higher in elevation. (T.R. p. 130.) Highway 66 parallels the railroad tracks at the scene of the accident to the north of the tracks, and Peggy's Cafe is on the north side of the highway. Both the railroad tracks and the highway extend in a general easterly and westerly direction. (T.R. pp. 47, 48.)

Before going into Peggy's Cafe, Wilson parked the truck and trailer in a jack-knifed position at the southwest corner of the Cafe, headed west (see diagram, T.R. p. 28, and p. 72), and on the highway right of way. (T.R. pp. 78, 67, 80.) From the point where the truck was parked to where the accident occurred, the ground slopes in a general southwesterly direction (T.R. p. 59); so that if a vehicle started to roll, it would cross the highway and roll southwesterly to the railroad tracks. (T.R. pp. 67, 68.) Tire marks from the point where the truck was on the railroad rails extended back in a general northeasterly direction toward Peggy's Cafe. (T.R. pp. 58, 59.) When Wilson came out of the Cafe after having a cup of coffee, he found that the truck was gone, and he went down to the railroad tracks and found that the truck he had parked was the one that had been struck by the train. (T.R. p. 146.) The explanation given by Wilson for the truck getting away was that the air brakes had leaked. (T.R. pp. 183, 184.)

## ARGUMENT.

### (1) THE TRIAL COURT PROPERLY EXCLUDED FROM EVIDENCE THE COMPLAINTS FILED BY THE PLAINTIFFS AGAINST THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

The complaints that were offered in evidence did not contain any statement that was inconsistent with their testimony on the witness stand. There was no statement that was made by the plaintiffs on the stand that appellants offered to impeach or contradict by anything alleged in the complaints on file against The Atchison, Topeka and Santa Fe Railway Company. All that the complaints charged was that The Atchison, Topeka and Santa Fe Railway Company was also guilty of some negligence that contributed to the happening of the accident.

It is well established that the law does not seek to recognize only one proximate cause of an injury, consisting of only one factor, one act, one element or circumstance or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause.

Consequently, when one feels that he has been injured by the negligent conduct of one or more persons, he can sue either or both, and he can sue them jointly or severally (38 Am. Jur. 946 § 257, Negligence) without there being any inconsistency in the statements in his pleadings.

"In an action for injury alleged to be due to a neglect of duty on the part of the defendant, it is no defense that a similar duty rested upon another person. The negligence of one person is in no sense justified by the concurring negligence of another."

38 *Amer. Jur.* 716, Section 64, Negligence.

Further, the complaints were not verified by the plaintiffs nor had they seen the pleadings. The pleadings were prepared, signed and verified by counsel. (T.R., pp. 99, 101, 116):

Q. Did you, Mr. Trotter, actually sign this pleading that is referred to by counsel; did you sign and swear to it?

Mr. Struckmeyer. No it is not so contended. It is verified by his attorney.

(T.R. p. 99.)

Q. Did your attorneys in California show you a copy of the complaint which had been filed.

A. A copy of what?

Q. A copy of the pleadings that had been filed.

A. No, they have not.

Q. They didn't, but you gave them in answer?

A. All that I had.

(T.R. p. 101.)

Q. (of Mr. Rayburn). And do you know on what grounds that suit was based?

A. No, sir.

(T.R. p. 116.)

The Federal rule in such a situation is that "as a condition of admissibility, the statement (contained

in such complaint) must be proximately connected with the party as one which he has made because it was true." See *Delaware County v. Diebold Safe etc. Co.,* 133 U.S. 473, 10 S. Ct. 399, 33 L. Ed. 674, where it was said:

> "* * * and the former complaint, not under oath, nor signed by the plaintiff, but only by its attorneys was clearly incompetent to prove an admission by the plaintiff that upon those facts it had not a cause of action against this defendant."
>
> 10 S. Ct. 403.

The rule as stated in 22 C.J. p. 355, section 376, *Evidence* and supported by numerous authorities is as follows:

> "* * * but the more generally accepted view recognizes a distinction between statements contained in pleadings in another case which are emanations of counsel and those which can fairly be regarded as statements by the party, and as a result, requires, as a condition of admissibility, that the statement be affirmatively connected with the party as one which he has made because it was true."

The trial court was clearly correct in excluding the complaints from evidence for two reasons: first, because there was nothing inconsistent or contradictory in the pleading that would impeach the testimony given by the plaintiffs, and second, the complaints were not signed or verified by the plaintiffs, and they did not know what was charged in the complaints.

**(2) THE COURT DID NOT COMMIT ERROR IN INSTRUCTING THE JURY UPON THE DOCTRINE OF RES IPSA LOQUITUR AND GAVE A PROPER INSTRUCTION UPON THAT DOCTRINE.**

The evidence showed that the driver operating the defendant's truck parked the truck at a point where if it started from any cause, it would roll to the very point that it did.

> Q. (of witness Atkins). With respect to the vicinity of Peggy's Cafe, how did these tracks run from the railroad?
>
> A. Well, they ran in a general direction of Peggy's Cafe from the point where I found them on the track there.
>
> Q. Are you familiar with the contour of the ground there? By that, I mean how it slopes.
>
> A. Fairly well, yes. It has a slope in a southwesterly direction there.
>
> Q. Well, from the vicinity of this cafe, you mean across the road?
>
> A. Yes, to the track.
>
> (T.R. pp. 58, 59.)

> Q. (of witness Marbell). A car or truck of the kind and character involved in this accident, parked in the vicinity of Peggy's Cafe, if the brakes became loosened for some reason, it would be the natural thing to roll down in that direction and upon the tracks?
>
> A. Yes, it would.
>
> (T.R. p. 68.)

The plaintiffs' witness, Dewey A. Pennington, saw the truck parked at the west corner of Peggy's Cafe and headed west.

Q. While you were there did you observe any truck in the vicinity of Peggy's Cafe?

A. Yes, I saw a truck sitting there at the west corner of the building.

(T.R. p. 48.)

Sam Marbell, one of the State patrolmen who investigated the accident, testified on behalf of plaintiffs and stated that it was determined from his investigation that the truck was parked at the southwest corner of Peggy's Cafe, in a jackknife position, headed west.

Q. Did you ascertain in what way it was parked? By that I mean was it pointed westward on the road or eastward?

A. It was parked in a jackknife position, the cab headed—the front of the truck head west.

(T.R. p. 67.)

Q. All right. Now, the truck was parked where? Draw a diagram where the truck was parked.

(The witness complies.)

Q. And it was parked which way, facing which way?

A. Facing west.

Q. Facing west?

A. Headed west.

(T.R. p. 72, see T.R. p. 28 for diagram showing location of parked truck.)

The driver of the truck testified that the truck was left in forward overdrive.

Q. In what gear did you put it?

A. Well, the Eaton was in overdrive, and the Brownie, I believe, was in overdrive.

Q. They were both in forward overdrive?

A. Yes, sir.

(T.R. p. 144.)

The wheels of the truck were not turned or cramped.

(See diagram T.R. p. 28.)

Mr. Wilson further testified that he set all the brakes.

Q. Now, in addition to that you put on your air brake?

A. Pulled on the air brake.

Q. You put on your air brake?

A. I set the air brake before I even tried anything else.

Q. Well, you set the air brake?

A. Yes, sir.

Q. And you pulled on the mechanical brake?

A. The emergency brake, yes, sir.

(T.R. p. 145.)

Under these facts, the plaintiffs were entitled to the benefit of the *res ipsa loquitur* doctrine. The exclusive control of the truck was in the hands of the defendant's employee, Conda Wilson. All that the plaintiffs could show was where the truck was parked, that it would roll from that point to the scene of the accident, and that unattended it did roll onto the tracks of the railway company. The plaintiffs had no way of proving specific acts of negligence, and certainly if the truck had been parked carefully, it would not have run down the grade.

The law covering this situation is very ably stated in California Jurisprudence Supplement Vol. 2, page 243, § 162:

> "Where the evidence shows that the defendant's vehicle was parked on an incline down which it ran unattended, the plaintiff is entitled to recover, apparently, although there is nothing to show a specific act or omission on the part of the defendant. The implication from the facts is that the defendant did not take precautionary measures in the matter of the setting of the emergency brake, engaging the gears or turning the wheels toward the curbing. If he testifies that he did set the brake, the inference is that the brake was not adequate; and if it appears—for example, from tests that were made after the happening of the collision—that the brakes were adequate, the implication is that they were not properly set."

The facts as developed by the plaintiffs presented a clear situation where the *res ipsa loquitur* doctrine was applicable. It is the law that the *res ipsa loquitur* doctrine applies where a motor vehicle, after being parked on a grade, runs down the grade and causes injury. See Annotation, 66 A.L.R., 441-443, *American Express Company v. Terry,* 126 Md. 254, 94 Atl. 1026, Ann. Cas. 1917C, 650, and *Biller v. Meyer,* C.C.A. 7, 33 Fed. (2d) 440, 66 A.L.R. 436, where it is said:

> "The negligence of defendant, whose automobile, shortly after being parked on a grade, started down the hill and injured the plaintiff, is for the jury under the doctrine of res ipsa loquitur, although the defendant testified that he had set the brakes and put the gear in reverse."

See also *Price v. McDonald,* 7 Cal. App. (2d) 77, where the Court states:

> "We are of the opinion that under such allegations a presumption of negligence arises when an unattended automobile coasts down a hill and that upon proof of these facts, it becomes incumbent upon the person having control to explain the cause of the car's movement. Defendants in the case at bar did not relieve themselves from liability by mere proof that they safely parked the car. Their testimony to that effect enables them to argue with plausibility that some one else must have interfered with the car but that argument was one for the jury and does not constitute a sufficient defense in the absence of all evidence that such was the fact. We are of the opinion that the case made by the plaintiff satisfactorily establishes all of the elements necessary to bring into operation the doctrine of res ipsa loquitur."

There was evidence in the record that would support a finding that the reason for the truck rolling down onto the railroad tracks was that the brakes were, in fact, defective. Officer Marbell testified that Mr. Wilson, the driver of the truck, told him that the only reason he could account for the truck getting away was that the air had leaked out of the brakes.

> The Court. All right, what did he (Conda Wilson) say at that conversation?
>
> A. The driver stated that the only reason he could find for it (the truck) getting away was the fact that he lost his air.
>
> (T.R. pp. 183, 184.)

The appellant cites no cases contrary to the above authority. Appellant also overlooks the fact that there was a conflict in the evidence as to the point where the truck was parked; and he fails to recognize the rule that all adverse testimony is to be disregarded on appeal. The cases relied upon by the appellant present situations where the uncontradicted evidence showed no liability.

The instructions that were given upon the doctrine of *res ipsa loquitur* are as follows:

> "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiffs. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he did, in fact, exercise ordinary care and diligence, or that the accident occurred without being proximately caused by any failure of duty on his part.
>
> "The instruction just given may appear to constitute an exception to the general rule, that (196) the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows:
>
> "**First**: The fact that some certain instrumentality, by which injury to the plaintiffs was proxi-

mately caused, was in the possession and under the exclusive control of the defendant at the time the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act or omission incident to defendant's management.

"Second: The fact that the accident was one of such nature as does not happen in the ordinary course of things, if those who have control of the instrumentality use ordinary care.

"Third: The fact that the circumstances surrounding the causing of the accident were such that the plaintiffs were not in a position to know what specific conduct was the cause, whereas, the one in charge of the instrumentality may reasonably be expected to know and be able to explain the precise cause of the accident.

"When all these conditions are found to have existed, the inference of negligence to which they (197) give birth will support a verdict for the plaintiffs in the absence of a showing by the defendant that offsets the inference."

(T.R. pp. 190, 191.)

These instructions clearly state the doctrine of *res ipsa loquitur*. They do not say, as counsel contends, that the court instructed the jury that they must return a verdict against the defendant. All these instructions did was to carefully outline a situation where the doctrine applied and told the jury that under such facts an inference arose which would support a verdict. The jury was further instructed that at all times it was the burden of the plaintiffs to establish negligence upon the part of the defendant by a preponderance of the evidence.

"If you believe from the evidence that the driver of the truck in question exercised ordinary and reasonable care in parking the truck, and that he took such steps as an ordinary and reasonably prudent person would take to safeguard the said truck against moving, then in that event you shall return a verdict for the defendants.

"I further charge you that if the defendants, acting through the driver of his truck, exercised reasonable and ordinary care as I heretofore defined to you, in the parking of the truck, and though said truck thereafter, through external (200) cause not shown by the evidence, came to rest on the tracks of the Santa Fe Railway Company, then it is your duty to find a verdict for the defendant. In other words, it is not the duty of the defendants to explain or show the reason why their truck came upon the tracks of the Santa Fe Railway Company, but it is the duty of the plaintiffs to prove by a preponderance of the evidence that this truck came upon the track of the Santa Fe Railway Company through the negligence of the defendant."

(T.R. pp. 193, 194.)

The instructions upon the doctrine of *res ipsa loquitur* were those contained in California Jury Instructions, Civil Instruction 206B and 206C at pages 321 and 322, each of said instructions being supported by innumerable authorities. Under the evidence and the law, the instruction upon the doctrine of *res ipsa loquitur* was properly given by proper instructions.

(3) The trial court did not commit error in giving instructions based upon Arizona statutes dealing with the parking of automobiles on the highway.

The following is the instruction complained of:

"I instruct you that the laws of Arizona, Section 66-118, A.P.A. 1939, provide:

"'No person having control or charge of a motor vehicle shall allow it to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor, and when standing upon any grade without turning the front wheels to the curb or side of the driveway.'

"If you should find from the evidence in this case that C. E. Wilson, the driver of the truck involved in this accident, failed to comply with the provisions of the section just read to you and that he left said truck unattended, without first effectively setting the brakes thereon, or without turning the front wheels to the curb or side of the roadway, you are instructed that such failure constitutes negligence as a matter of law.

"However, in this action, a violation of this law would not be of any consequence unless it was the proximate cause or contributed in some degree as a proximate cause to the injuries found by you to have been suffered by the plaintiffs, or either of them, in the event you so find they have suffered injuries."

(T.R. p. 189.)

Appellant's contention that there is no evidence justifying the giving of the instruction is wholly without merit. Plaintiffs introduced ample testimony from which the jury could have found that the truck was parked on the highway within the meaning of the Arizona statute, Section 66-118, A.P.A. 1939. The testimony of Officer Marbell shows positively that the

defendant's truck was parked on the highway right of way. (T.R. pp. 78, 79.)

Q. Did you ascertain in what way it was parked? By that I mean was it pointed westward on the road or eastward?

A. It was parked in a jackknife position, the cab headed—the front of the truck head west.

Q. On the north side of the road?

A. On the north side of the road.

Q. Would that be partly on the right of way?

A. Yes, it would, off the pavement.

(T.R. p. 67.)

Q. Now, referring again to the sketch that you made, Mr. Marbell, in which you place the truck itself apparently towards the highway. Would that be within the boundaries of the highway, the truck?

A. You mean the right of way?

Q. The right of way.

A. Yes.

(T.R. p. 78.)

This testimony clearly discloses that the truck was not only operated upon the highway but was parked upon the highway within the contemplation of the Arizona statutes and was in a place open to the public as a matter of vehicular travel.

(See diagram T.R. p. 28.)

Section 66-401, A. C. A. 1939, defines highways as follows:

"Highway means any way, road or place of any nature open to the use of the public as a matter of right for the purpose of vehicular travel."

The above testimony showed that the truck belonging to the defendant was parked in a place open to the use of the public and use for the purpose of vehicular traffic. Even if we assume that the truck was parked where Mr. Wilson stated that he parked it, it would still be on the highway right of way and in a place open to the use of the public and as a matter of vehicular travel. The instruction as given contained all of the elements required. See *Valley Transp. System v. Reinhartz,* 197 Pacific (2d) 269.

Under the evidence showing that the truck was parked on the highway right of way, the instruction as given was proper in order to submit the entire issue of fact to the jury.

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**CONCLUSION.**

It is respectfully submitted that there was no error committed by the trial court either in excluding the evidence or in instructing the jury and that there was ample evidence which was the basis for the verdict of the jury, and plaintiffs respectfully urge that the judgments be affirmed.

Dated, Oakland, California,
November 1, 1948.

Respectfully submitted,
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